Nos. 13963, 14030, 14031, 14032, 14033, 14034

United States
COURT OF APPEALS
for the Ninth Circuit

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend LEE BEN KOON,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

Appellants, in each of these cases, filed their complaints to be declared nationals and/or citizens of the United States under the provisions of Sec. 503 of the Nationality Act of 1940 (Title 8, U.S.C.A., Sec. 903) in the United States District Court for the District of Oregon. Their complaints were dismissed by order of Dis-

trict Judge James Alger Fee on June 18, 1953 (Tr. 16). Notices of appeal were duly filed with the Clerk of this Court and consolidation of all cases was ordered by this Court, upon stipulation of all counsel (Tr. 38-41).

Jurisdiction of the District Court to entertain the complaints of appellants, declaring them to be nationals and/or citizens of the United States, is conferred by Sec. 503 of the Nationality Act of 1940, 54 Stat. 1171, (Title 8, U.S.C.A., Sec. 903) and Sec. 1343 of Title 28, U.S.C.A. Jurisdiction of the Court of Appeals to review the District Court's final orders is conferred by Sec. 128 of the Judicial Code, as amended (28 U.S.C.A. 1291).

The orders of the District Court in dismissing the complaints of appellants for judgments, declaring them to be nationals and/or citizens of the United States, are final decisions within the meaning of Sec. 128 of the Judicial Code.

These cases all come within the meaning and interpretation of Sec. 503, and we quote said section:

> "JUDICIAL PROCEEDINGS FOR DECLARATION OF UNITED STATES NATIONALITY IN EVENT OF DENIAL OF RIGHTS AND PRIVILEGES AS NATIONALS; CERTIFICATE OF IDENTITY PENDING JUDGMENT.
>
> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia

or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have initiated such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, Sec. 503, 54 Stat. 1171."

STATEMENT OF THE CASE

Appellants, six in all, filed their complaints in the District Court of the United States for the District of Oregon for declaratory judgments under Sec. 503 of the Nationality Act of 1940 (quoted above). Their complaints are similar in all respects to the complaint shown herein (Tr. 3-7) and in substance are as follows:

1. That appellants were born in China and are true and lawful blood sons of their fathers, who are citizens of the United States.

2. That said complaints contain statistical data covering the parents' marriage and dates and places of birth of appellants herein.

3. That the appellants are citizens of the United States and claim permanent residence within the jurisdiction of the District Court.

4. That appellants filed applications for passports or travel documents with the American Consulate General in Hong Kong in order that they would be eligible to purchase transportation to the United States in order to apply for admission as citizens thereof at a port of entry under the immigration laws; that the American Consulate General has refused documentation for more than six months in some cases to more than several years in others, as shown on the face of the various individual complaints; that such conduct by the American Consulate General is a denial of a right or privilege of a United States national.

5. That the Americal Consulate General in Hong Kong is an official executive of the Department of State, and that as such, has denied appellants the right to proceed to the United States, which is a denial of a right or privilege of a United States national.

6. That the proceedings are filed under Sec. 503 of the Nationality Act of 1940 (8 U.S.C.A., 903).

7. That appellants claim United States nationality and citizenship in good faith and on a substantial basis, and are entitled to be declared a national of the United States.

All complaints conclude with a prayer asking the Court to find appellants to be nationals of the United States.

The only exceptions differentiating the cases are:

1. That in case No. 14030, *Woo Chin Chew vs. Acheson,* the American Consulate General at Hong Kong officially denied appellants' application for passport or travel document to the United States.

2. That in case No. 13963, *Ming vs. Dulles,* this Court has ordered substitution of John Foster Dulles, Secretary of State for the United States, as defendant, in place of Dean G. Acheson.

3. That the time elapsing between the filing of applications for passports or travel documents and the time of filing their complaints vary with each appellant, as shown by the face of the complaint in each of the cases, but all lapses are over six months and up to and including several years.

Notices to dismiss the complaints were filed in each of these cases on behalf of the Attorney General of the United States (Tr. p. 9) on the ground that appellants' complaints, on their face, show that applications for passports have not been denied the appellants, and that, therefore, appellants have not been denied any rights.

Appellants filed timely motions, supported by affidavits, to substitute John Foster Dulles, Secretary of State for the United States, in place of Dean G. Acheson (Tr. 10-11).

Hearings were had on the motions to dismiss appellants' complaints (Tr. 21) (Tr. 31), and on motion of appellants to substitute (Tr. 10-11), and opinion rendered by the District Court (Tr. 14) and orders of dismissal followed said hearings (Tr. 16). This appeal results.

SPECIFICATION OF ERROR

Appellants respectfully contend that the District Court erred in:

1. Denying appellants' motions to substitute John Foster Dulles, Secretary of State of the United States, as party defendant for and in place of Dean G. Acheson.

2. Dismising the cases on the ground that the Department of State, through its consulate officer, has never denied appellants' applications for entry into the United States.

3. Dismissing the cases on the ground that appellants had never resided in the United States of America.

4. Dismissing said cases on the ground that Sec. 903, Title 8, U.S.C.A. never intended that individuals asserting claims such as that asserted by the appellants herein, who had lived their lives as Chinese and who had never resided in the United States, have the status to avail themselves of Sec. 903, Title 8, U.S.C.A.

SUMMARY OF ARGUMENT

1. Appellants duly and timely filed their motions, supported by affidavits (Tr. 10-12) for the substitution of John Foster Dulles for Dean G. Acheson within six months after John Foster Dulles took office as Secretary of State of the United States, and have complied with Rule 25-D of the Federal Rules of Civil Procedure. Both motions and affidavits have alleged that there is substantial need for continuing and maintaining these actions, and that John Foster Dulles had not indicated any change in ruling or attitude concerning the relief prayed for in appellants' complaints from that of his predecessor, Dean G. Acheson. Reference is made to District Judge Fee's Memorandum Opinion (Tr. 15). This court has made a practice of allowing similar motions.

2. Appellants have filed applications for documentation with the American Consulate General at Hong Kong, indicating their desire and intention to proceed to and take up permanent residence in the United States. The American Consulate General, an executive official of the Department herein, refused, and has refused as of this date, to issue to appellants any form of documen-

tation which would permit them to proceed to the United States to have their nationality determined by the Immigration and Naturalization Service. Appellants contend that this delay on the part of the American Consulate General at Hong Kong to act upon their applications for a travel document or passport is tantamount to a denial.

Look Yun Lin vs. Acheson, 95 Fed. Sup. 583.
Lee Bang Hong vs. Acheson, 110 Fed. Sup. 48.
Lee Mun Way vs. Acheson, 110 Fed. Sup. 60.
Yee King Gee vs. Acheson, 184 Fed. 2d 382.

It is also the contention of appellants that the District Court is given original jurisdiction to determine the nationality status of appellants to nationality, and that their actions under Sec. 503 are independent judicial proceedings are not review trials de novo.

3. For the sake of brevity, specifications of error 3 and 4 will be discussed together, inasmuch as they challenge the jurisdiction of the court to entertain these cases. Sec. 503 in its wording provides that actions may be brought thereunder by those, such as appellants herein, who have never been in the United States. Federal Courts have jurisdiction of cases similar to appellants' herein and are amply supported by a long line of cases where the Federal Courts have exercised their jurisdiction to adjudicate the rights or claims of nationals.

Acheson vs. Yee King Gee, 9 Cir., 184 Fed. 2d 382.
Attorney General vs. Ricketts, 9 Cir., 165 Fed. 2d 193.

Podeau vs. Acheson, 3 Cir., 170 Fed. 2d 306
Bauer vs. Clark, 7 Cir., 161 Fed. 2d 397.
Brassert vs. Biddle, 2 Cir., 148 Fed. 2d 134.
Look Yun Lin vs. Acheson, 87 Fed. Supp. 463.

ARGUMENT

1. The motions, supported by affidavits, for substitution of John Foster Dulles for Dean G. Acheson were arbitarily denied by the District Court, although specifications of Rule 25-D of the Federal Rules of Civil Procedure were complied with. When the motions for dismissal were heard by the District Court covering these cases, motions to substitute John Foster Dulles for Acheson had been filed in all cases but Case No. 13963, *Chin Chuck Ming vs. Dulles,* herein included in this appeal. The District Court denied the motion to substitute in all cases herein where motions to substitute had been filed and dismissed the *Ming* case, No. 13963, for failure to file such motion (Tr. 29-30). The *Ming* case, No. 13963, was, therefore, appealed to the United States Court of Appeals for the Ninth Circuit, and a motion to substitute John Foster Dulles for Dean G. Acheson was made in said case in the Appellate Court, and the Appellate Court properly allowed said motion and substituted John Foster Dulles for Dean G. Acheson (Tr. of Record in Case No. 13963, p. 30). The District Court was, therefore, in error in his rulings on substitution of defendant Dulles for Acheson, and similar rulings on substitution of defendants should be made by this Court as has been done in the *Ming* case, No. 13963, herein included in this appeal.

2. Further ground for dismissal of these suits is set forth in (Tr. p. 17); that the complaint on its face shows that appellants' applications for passports had not been denied them. All of appellants herein filed their applications for passports and/or travel documents more than six months before filing their complaints herein. How long should appellants wait for the Consul to act? Appellants contend that the dilatory action on the part of the Consul is tantamount to a denial of their applications. The appellants' complaints set forth the rights of the appellants, and the duty of the Consul, and a breach of the duty by the American Consulate by failing, denying or refusing to comply with the rights and privileges appurtenant to the appellants as United States nationalists. The maxim "Justice delayed is justice denied" holds true in these instances. This principal was involved in the case of *Nuspel vs. Clark,* 83 Fed. Sup. 963, as well as Look Yun Lin vs. Acheson, 95 Fed. Sup. 583, wherein the Court states:

> "When alleged citizen detained in China applied in 1946 for documentation as a citizen with American Consul, and claim was referred in 1950 to Washington after exhaustive attempts to secure a certificate of identity on the consulate level, and a delayed citizens' counsel had complied with federal regulations, and the state department had failed to act on the application for eight months, alleged citizen had exhausted her administrative remedies and would be granted certificate of identity to proceed to the United States to attend a court hearing to establish her citizenship." Nationality Act of 1940, Sec. 503, U.S.C.A., Sec. 903.

The appellants, by filing an application for documentation with the American Consulate General at

Hong Kong, indicated their desire and intention to proceed to and take up permanent residence in the United States. The American Consulate General, an official executive of the defendant herein, refused, and has refused as of this date, to issue to these applicants any form of documentation which would permit them to proceed to the United States.

Section 224 of Title 22, U.S.C. makes it unlawful when the United States as at war or during the existence of a national emergency proclaimed by the President for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless such person is in possession of a Unitted States passport. Section 225 of Title 22, U.S.C.A. prescribes a criminal penalty against the person involved or the transportation carrier for violation of Section 224. These sections have been continued in effect by subsequent legislation despite the President's proclamation of April 28, 1952, terminating the national emergency proclaimed May 27, 1941. See Public Law 450, 82nd Congress, Second Session, passed July 7, 1952.

Under the practice in effect at the time of filing of these complaints, the Foreign Service in China—if it were favorably disposed—granted to an applicant such as these appellants, in lieu of a United States passport, a document identified as a "travel affidavit". This document contained a recitation of the party's desire to proceed to the United States and have his nationality determined by the United States Immigration and Naturalization Service. Even though there was no specific regulation governing its issuance, possession of such

"travel affidavit" was construed as compliance with the passport requirements. Under this procedural system, the persons granted such documentation were permitted to proceed to a port of entry of the United States for the purpose of having their claims established by the administrative agency charged with such duty. Of course those denied documentation were likewise denied the right to proceed to a port of entry for the purpose of having their admissibility determined. At the time these actions were filed, the Department of Sstat had no statutory authority to make a determination of United States nationality.

Measured by any reasonable standard of conduct, this record establishes that these appellants have been denied their rights as nationals to travel to the United States. This Court, as previously stated, is given original jurisdiction to determine the nationality status of the claimant to nationality. It does not review the determination of the American Consulate. Had the Consulate granted these appellants' applications for a passport or travel document, these appellants would have proceeded to a port of entry, there made their applications for nationality determination by the proper administrative governmental agency—the Immigration and Naturalization Service. But the Consulate has elected not to grant these appellants' requests, and these appellants had no course to follow as nationals but to institute their actions under Section 503 while outside the territorial limits of the United States.

The action under Section 503 is an independent judicial proceeding, and is *not a review trial de novo.*

In *Wong Wing Foo vs. McGrath,* 196 F. 2d 120, the Court had occasion to consider this question in the course of determining the admissibility of evidence. The Court said, at page 121:

> "Plaintiff here centends that the district court erred in not treating the instant Sec. 903 proceeding as an independent action, but instead as a review of the special board of special inquiry proceedings in which the evidence taken before that board was considered with other evidence taken before the district court. That is to say, the court below regarded the Sec. 903 proceeding as though it were a review trial de novo. We can find nothing in the language of Sec. 903 warranting treating the action there provided *as anything other than an independ ent action which plaintiff could have brought as soon as the immigration owcials refused to accept his passport and to allow him to enter.* Such an action brought at once could not have its independent character changed by a subsequent administrative proceeding under Sec. 153." (Emphasis supplied.)

Then after quoting the statute (Section 503 of the Nationality Act of 1940, referred to in the opinion as Section 903, 8 U.S.C.A.), the Court continued:

> "Nothing in the above text suggests that the 'action * * * for a judgment declaring him to be a national' is to succeed some prior administrative proceeding. This acton is largely invoked where there has been no administrative proceedings at all. Such is the case where the Department of State refuses to give a passport. Perkins vs. Elg, 307 U.S. 325; Podea vs. Acheson, 179 F. 2d 306 (Cir. 2); or where a consul refuses to register a person as a United States national Acheson vs. Mariko Kuniyuki, 189 F. 2d 741 (Cir. 9); or refuses to allow a person claiming American citizenship to come to this country, Acheson vs. Yee King Gee, 184 F. 2d

382 (Cir. 9); or where American citizens acting under claimed duress have filed woth the Attorney General notices of their renunciation of citizenship and then later seek to have them set aside. McGrath vs. Tadayasu Abo, 186 F. 2d 766 (Cir. 9). In none of the above cases is the Sec. 903 action a trial de novo. *There has not been anything tried by the Department of State or of Justice to be tried again as on appeal or review.*" (Emphasis supplied.)

Does the District Court say that it may not entertain the present action unless and until the American Consulate at Hong Kong elects to speak? Does the District Court suggest that it is powerless to grant relief to appellants so long as the Consulate takes refuge behind a wall of silence?

"Justice delayed is justice denied" is a historic maxim of our law. It was aptly applied by the Court in *Nuspel vs. Clark,* 83 F. Supp. 963, which was a Section 503 action brought to secure an immigration visa for plaintiff's wife. The Secretary of State had held the application in abeyance, pending the ultimate determination of plaintiff's status. The Court said, at page 965:

> "Counsel for the defendants assert that this 'holding in abeyance' does not constitute a denial of such rights or privileges. It seems, however, that the failure to grant the visa for plaintiff's wife within a reasonable time *constitutes a denial of such application equally as much as justice delayed is justice denied.*" (Emphasis supplied.)

Finally, we respectfully direct the Court's attention to the plain language of Section 503. Nowhere in that statute is there any statement that the denial of a national's rights or privileges must be accomplished in a particular manner before the Court can entertain the

action. The statutory requirements are met if the national's rights or privileges are denied. That denial may result from any one of many acts or omissions of any "department or agency, or executive official thereof." We respectfully challenge defendant to point to any authority in the statute which supports his position that this Court cannot act until the American Consulate has chosen to act upon an application for travel documents.

3. Other ground for the District Court's dismissal of appellants' complaints is that appellants have never resided in the United States (Tr. p. 18), and as such, cannot maintain their actions under Section 903, and that Congress never intended that claims, such as asserted by appellants herein, who had lived their lives as Chinese and who had never been in the United States, have the status to avail themselves of said section. There is nothing in the reading of Section 503 that states that appellants must reside in the United States before filing their actions. These contentions of the District Court challenge the jurisdiction of said court. The District Court erred in dismissing these actions on these grounds, as hereinafter shown.

Section 1343 of Title 28, United States Code Annotated, provides that the United States District Courts shall have original jurisdiction in matters which affect the rights or privileges of citizens of the United States.

In the instant cases, these appellants expressly bring their respective actions under Section 503 on the Nationality Act of 1940 (8 U.S.C.A. 903). Defendant does not urge or the District Court does not say that the

complaints are not brought in good faith. As a general rule, if the allegations of the complaints in good faith make a claim within the jurisdiction of the Court, the Court has jurisdiction, regardless of whether or not the claim is well founded. *Utah Fuel Co. vs. National Bituminous Coal Comm.,* 306 U.S. 56, 59 S. Ct. 409.

The District Court has obscured the distiction between the issue of jurisdiction and that of the merits of the case. That distinction was precisely stated by the Supreme Court in *Binderup vs. Pathe Exchange,* 68 L. Ed. 308, 314, 44 S. Ct. 96, 263 U.S. 291, at page 305, where the Court said:

> "Jurisdiction is the power to decide a justifiable controversy and includes question of law as well of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide the legal sufficiency of the facts proven. Its decision either way, upon either question, is predicated upon existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous; or, in other words, is plainly without color or merit."

The fact that Federal Courts have jurisdiction is amply supported by a long line of cases where the Federal Court has exercised its jurisdiction to adjudicate the rights or claims of nationals.

> Acheson v. Yee King Gee, 9 Cir., 184 F. 2d 382.
> Podeau v. Acheson, 3 Cir., 170 F. 2d 306.

Attorney General v. Ricketts, 9 Cir., 165 F. 2d 193.

Bauer v. Clark, 7 Cir., 161 F. 2d 397.

Brassert v. Biddle, 2 Cir., 148 F. 2d 134.

Look Yun Lin v. Acheson, 87 F. Supp. 463.

In the case of *Acheson v. Yee King Gee,* supra, the Court of Appeals for the Ninth Circuit states:

> "Both below and here the Secretary has urged but two propositions, (1) that the district court was without jurisdiction to entertain the suit, and (2) * * *. We agree with the trial court that the Secretary is wrong on both counts."

Similar motions to dismiss on this ground, want of jurisdiction, were denied by the United States District Court at San Francisco, California, in the following cases:

Lee Shew v. McGrath, No. 29350.

Hong Yick Foo & Hong Yick Ming v. Acheson, No. 29428.

Toy Teung Kwong v. Acheson, No. 29877.

Wong Gan Chee v. Acheson, No. 29925.

Wong Yip Fong v. Acheson, No. 29945.

Jo Ting v. Acheson, No. 29948.

Heuy Hip v. Acheson, No. 30005.

Wong Ting Hin v. Acheson, No. 30006.

Hum Yet Shan v. Acheson, No. 30007.

Jo Ting v. Acheson, No. 30185.

Jee Ngen Sun v. Acheson, No. 30186.

Yee Kwock Shirn v. Acheson, No. 30278.

Chin Bing San v. Acheson, No. 30301.

Fong Sik Leung v. Acheson, No. 30318.

Lee Wot v. Acheson, No. 30345.

Camera v. Acheson, No. 30346.

Ow Yeong Yung v. Acheson, No. 30361.

The Honorable Michael L. Igoe, United States District Court at Chicago, Illinois, in the case of *Lee Wing Hong, et al. v. Dulles,* 51-C-1920, in his conclusions of law held:

> "This Court has jurisdiction under Section 503 of the Nationality Act of 1940 (8 USC 903) and under the Declaratory Judgement Act (28 USC 2201)."

Under the authorities above cited, it is respectfully submitted that this Court has jurisdiction of the parties and of the subject matter of the controversy in each of these cases, and is empowered and authorized under the Statute to adjudicate the claims of appellants to United States nationality and to grant the relief requested.

The basic considerations of the sufficiency of the complaint, when challenged by a defendant's motion to dismiss are well settled and not subject to dispute. It has sometimes inexactly been said that a motion to dismiss a complaint for failure to state a cause of action is a substitute for the former demurrer in an action at law or a motion to dismiss for want of equity in suits in equity. This is not an exact statement of the law since the new Rules of Federal Civil Procedure do not require that a complaint shall state facts sufficient to constitute a cause of action.

> Dennis v. Village of Tonka Bay, 8 Cir., 151 F. 2d 411, 412.
> Dioguardi v. Durning, 2 Cir., 138 F. 2d 774, 775.

In determining whether complaints state a claim on which relief can be granted, the test is whether in the light most favorable to plaintiff, together with those in-

ferences and legal conclusions reasonably issuing therefrom, and with every intendment regarded in his favor, the complaint is sufficient to constitute a valid claim.

Knox v. First Security Bank of Utah, 10 Cir., 196 F. 2d 112, 117.
Machado v. McGrath, DC, 183 F. 2d 706, 708.
Gruen Watch Co. v. Artists Alliance, 9 Cir., 191 F. 2d 700, 705.
Valle v. Stengel, 3 Cir., 176 F. 2d 697, 701.
Cool v. International Shoe Co., 8 Cir., 142 F. 2d 318.
Garbutt v. Blanding Mines Co., 10 Cir., 141 F. 2d 679.
Abel v. Munro, 2 Cir., 110 F. 2d 647.
U. S. v. Association of Am. RR., 4 P. R. 510.

A motion to dismiss on the ground that the petition does not state a claim upon which relief can be granted, admits all facts well pleaded.

Land v. Dollar, 330 U.S. 731, footnote 4, at page 735, 67 S. Ct. 1009, 81 L. Ed. 1209.
Polk v. Glover, 83 L. Ed. 6, 11, 305 U. S. 5, 59 S. Ct. 17.
Suckow Borax Mines Consol. v. Borax Consolidated, 9 Cir., 185 F. 2d 196, 205, Cert. denied 95 L. Ed. 680, rehearing denied 95 L. Ed. 1349.
Galbreath v. Metropolitan Trust Co., 10 Cir., 134 F. 2d 569, 570.
Warmsprings Irr. Dist. v. May, 9 Cir., 117 F. 2d 802, 805.
Tahir Erk v. Glenn L. Martin Co., 4 Cir., 116 F. 2d 865, 867.

A complaint should not be dismissed on motion without a hearing on the merits unless it appears to be a certainty that the plaintiff would be entitled to no relief under any statement of facts which could be proved to support his claim.

Gruen Watch Co. v. Artists Alliance, 9 Cir., supra.
Chicago & N. W. R. Co. v. Chicago Package Fuel Co., 7 Cir., 183 F. 2d 630, 631.
Amer. Federation of Labor v. Western Union Tel. Co., 6 Cir., 179 F. 2d 535, 536.
U. S. v. Arkansas Power & Light Co., 8 Cir., 165 F. 2d 354, 357.
Dollar v. Land, 154 F. 2d 307, affirmed supra.
Ware v. Travelers Ins. Co., 9 Cir., 150 F. 2d 463, 465.

Motions to dismiss complaints should be granted sparingly and only where plaintiff cannot under any theory prove his case.

Reeser v. National League Club, 84 F. Supp. 947.

The allegations of the complaint will be liberally construed on a motion to dismiss for failure to state a claim on which relief can be granted.

Gulf Coast Western Oil Co. v. Trapp, 10 Cir., 165 F. 2d 343, 347.

Any doubt should be resolved against the moving party.

Hawkins v. Frick-Reid Supply Co., 5 Cir., 154 F. 2d 88, 89.

The Court of Appeals for the 8th Circuit in *Leimer v. State Mut. Life Assur. Co.,* 108 F. 2d 302, 305, stated:

> "Rule 12(b)(6) authorizes a motion to dismiss a complaint for 'failure to state a cause of action upon which relief may be granted', which motion takes the place of the former demurrer in an action at law or motion to dismiss a bill of complaint for want of equity. A demurer or motion to dismiss for want of equity admitted, for the purpose of the demurrer or motion, all facts well pleaded in the

> complaint. Under the present practice, we think, the making of a motion to dismiss for failure to state a claim upon which relief can be granted has the effect of admitting the existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder. Such a motion, of course, serves a useful purpose where, for instance, a complaint states a claim based upon a wrong for which the plaintiff is without right or power to assert and for which no relief could possibly be granted to him, or a claim which the averments of the complaint show conclusively to be barred by the statute of limitations."

The Court continued by stating:

> "We think there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to be a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim."

Also see:

> Dennis v. Village of Tonka Bay, supra.
> Karl Kiefer Mach. Co. v. United States Bottlers Machinery Co., 7 Cir., 113 F. 2d 356, 357.

In the light of the foregoing, it must be admitted that these appellants claim to be United States nationals; that they have each filed an application with the American Consulate General in Hong Kong for a United States passport or travel document in lieu thereof; that these appellants have openly expressed a desire to proceed to the United States, the country of their claimed nationality; that the American Consulate General has refused to provide these appellants with any form of documentation; that these appellants cannot

proceed to the United States due to the provisions of statutes now in full force and effect which require them to be in possession of such documents before seeking admission, and that they now seek a judicial determination of their claims of United States nationality. These are all allegations which are taken as true in the decisions of these cases. Here, appellants, nationals of the United States, have been deprived of their right to travel to the country of their claimed nationality. How can it be said that the appellants have not been deprived of any right or privilege as nationals of the United States? This record emphatically disclosed that appellants' rights as nationals have been grossly abused.

As was stated by the Court of Appeals in the *Leimer* case, supra, such a motion admits "the existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder". If such motion admits the existence and validity of such claim, what is there for this Court to consider? Query, do these appellants have a right to assert in this Court a claim to United States nationality?

It is a fundamental and inherent right of a United States national to partake of the privileges granted to other members of the same class. It is a deprivation of "life" and "liberty" to deny a United States national the right to reside within the confines of the nation of his claimed nationality.

CONCLUSION

These actions have brought squarely within the provisions of Section 503 of the Nationality Act of 1940. Under it, this Court has jurisdiction to try the issues and to determine the appellants' claims to United States national status. By his conduct, an agent of the defendant has denied appellants' rights as nationals to proceed to the United States and take up permanent residence herein. Appellants' proceeding under the Statute seeks judicial relief from this denial and oppression. All these issues are simply and plainly set forth in the respective complaints. Certainly the complaints are sufficient to notify the defendant of the nature and basis of the action. This is especially true where the knowledge concerning the denial or rejection is a matter specifically known by the defendant. More than that, appellants are not required to do.

The District Court, in dismissing these cases, says, in effect, that appellants would not be entitled to relief even if appellants established all the allegations of the complaints. Such a conclusion defies the Statute.

On the pleadings, defendant has been guilty of a course of conduct which can be justified only if the Court should find that appellants, contrary to their respective claims, are not nationals of the United States. The truth or falsity of appellants' claims to nationality status is the core of the controversy before this Court.

When each of the complaints are viewed in the light most favorable, with all inferences and intendments, to

the appellants, and construed as to do substantial justice, there is no doubt that the pleadings are sufficient to meet the new Rules of Federal Civil Procedure.

It is asserted that the pleadings are sufficient to establish that the appellants have been denied a right or privilege upon that grounds that they are not nationals of the United States. If there is any slight omission, the Court normally bridges the natural gaps and sustains the pleadings whenever possible.

The pleadings presented here show that there is a justiciable controversy involving a Federal question arising under Federal Statute.

In view of the foregoing, it is respectfully submitted that under the Statute and the pleadings herein a reversal of the District Court's order dismissing these cases are in order.

Respectfully submitted,

RODNEY W. BANKS,
JOSEPH & POWERS,
Attorneys for Appellants.

Nos. 13963, 14031, 14032, 14033, 14034

In the United States Court of Appeals for the Ninth Circuit

LEE GWAIN TOY and LEE GWAIN DOK, by Their Father and Next Friend LEE BEN KOON,

Appellant,

vs.

DEAN G. ACHESON, Secretary of State of the United States,

Appellee.

APPELLEE'S BRIEF

On Appeal from the United States District Court for the District of Oregon

C. E. LUCKEY,
United States Attorney for the District of Oregon

VICTOR E. HARR,
Assistant United States Attorney,

Of Attorneys for Appellee.

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